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No. 692

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE MAX CHARLES WOLFF

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

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In response to the petition for a writ of certiorari in which the government contends that the court below misapplied applicable statutes and legal principles in finding that respondent was eligible for citizenship, respondent suggests that the case is moot since he has already taken the oath of allegiance and been admitted to citizenship.[1] He argues that his citizenship can be taken away only by a proceeding for revocation under Section 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1451(a). That very section

[1] Respondent took the same position before the court of appeals on argument. That court ruled against him, *sub silentio*, by considering the merits of the government's appeal, although it ruled against the government on the merits.

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of the Act, however, provides in subsection (j) as follows:

> Nothing contained in this section shall be regarded as limiting, denying, or restricting the power of any naturalization court, by or in which *a person has been naturalized*, to correct, reopen, alter, modify, or *vacate its judgment or decree naturalizing such person*, during the term of such court or *within the time prescribed by the rules of procedure* or statutes governing the jurisdiction of the court to take such action. [Emphasis added.]

The enactment of this provision was occasioned by the decision of this Court in *Bindczyck* v. *Finucane*, 342 U.S. 76, that a naturalization court did not have power to set aside a certificate of naturalization by a motion to vacate during the term of court. Such a power now exists under this subsection (j). And if a district court now has power to set aside naturalization on a petition for rehearing before appeal, it must also have power to vacate an order of naturalization pursuant to the mandate of an appellate court where an appeal has been taken in accordance with the rules of procedure applicable to that court.

Even without this provision in the 1952 Act, there would be no merit in petitioner's position. Since *Tutun* v. *United States*, 270 U.S. 568, 575, it has been established that there is a right of appeal from an order granting or denying naturalization. Both the majority and dissenting opinions in *Bindczyck* recognized that an appeal might involve vacation of naturalization (see 342 U.S. at pp. 86–87, 95–96). Courts of appeals have taken cognizance of appeals by the

United States after the taking of the oath of allegiance and admission to citizenship. See *United States* v. *Cunha*, 209 F. 2d 326, 327–328 (C.A. 1).

The judgment that an alien be admitted to citizenship carries with it permission to take the oath. It is a general principle that obedience to a judgment does not prevent review of the propriety of the issuance of that judgment. Thus, payment of a money judgment does not render the issue of liability moot (*Cahill* v. *New York, New Haven & Hartford Railroad Co.*, 351 U.S. 183); lifting of a boycott in obedience to an injunction pendente lite does not render moot an appeal from that injunction (*Bakery Drivers Union* v. *Wagshal*, 333 U.S. 437, 442); release from custody pursuant to a writ of habeas corpus does not render the proceeding moot, where, if reversed, the relator can be taken back into custody (*Eagles* v. *Samuels*, 329 U.S. 304). Since here the government contests the propriety of the order admitting respondent to citizenship, the controversy has not been rendered moot by virtue of his admission to citizenship under that judgment.

Respondent's position that admission to citizenship bars review of the judgment declaring that the alien be admitted to citizenship would be so contrary to established principles and practice that this in itself would be a question warranting consideration by this Court.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

MARCH 1960.